

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CHARLES FRAZIER

Petitioner,

VS.

RICK THALER, Director
Texas Department of Criminal Justice,
Correctional Institutions Division

Respondent.

§ § § § § § § § § §

NO. 3-11-CV-2204-M

ORDER ACCEPTING FINDINGS, CONCLUSIONS AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE, AND
DENYING A CERTIFICATE OF APPEALABILITY

The United States Magistrate Judge made findings, conclusions and a recommendation in this case. An objection was filed by petitioner on September 21, 2011. The District Court reviewed *de novo* those portions of the proposed findings, conclusions and recommendation to which objection was made, and reviewed the remaining proposed findings, conclusions and recommendation for plain error.

Petitioner objects to the Magistrate Judge's observation that his second state writ, *Ex parte Frazier*, WR-20,279-04, was dismissed for abuse of the writ pursuant to Article 11.07, Section 4 of the Texas Code of Criminal Procedure. Petitioner claims that the finding "is a misconstruction of the facts evidenced by the Record" because the state court found his successive state writ to have "met the high standard for a subsequent bite at the apple." Pet. Obj. at 1-2, ¶¶ 1, 4. Whether or not petitioner's second state writ was dismissed for abuse of the writ is inconsequential to the disposition of his successive federal writ. It is undisputed that petitioner filed a previous federal writ which was

denied on the merits. *See Frazier v. TDCJ*, No. 3:97-CR-0127-G (N.D. Tex. May 8, 1997), *COA denied*, No. 97-10608 (5th Cir. Nov. 7, 2009), *cert. denied*, 118 S.Ct. 1818 (1998). Accordingly, he may not file a successive federal writ in district court without authorization from a three-judge panel of the court of appeals. Finding no error, the Court ACCEPTS the Findings, Conclusions and Recommendation of the United States Magistrate Judge.

Considering the record in this case and pursuant to Federal Rule of Appellate Procedure 22(b), Rule 11(a) of the Rules Governing §§ 2254 and 2255 proceedings, and 28 U.S.C. § 2253(c), the Court DENIES a certificate of appealability. The Court adopts and incorporates by reference the Magistrate Judge's Findings, Conclusions and Recommendation filed in this case in support of its finding that the petitioner has failed to show (1) that reasonable jurists would find this Court's "assessment of the constitutional claims debatable or wrong," or (2) that reasonable jurists would find "it debatable whether the petition states a valid claim of the denial of a constitutional right" and "debatable whether [this Court] was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).¹

In the event the petitioner will file a notice of appeal, the court notes that

(X) the petitioner will proceed *in forma pauperis* on appeal.

() the petitioner will need to pay the \$455.00 appellate filing fee or submit a motion to

¹ Rule 11 of the Rules Governing §§ 2254 and 2255 Cases, as amended effective on December 1, 2009, reads as follows:

(a) Certificate of Appealability. The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, the parties may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.

(b) Time to Appeal. Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability.

proceed *in forma pauperis*.

SO ORDERED this 20th day of October, 2011.

A handwritten signature in black ink, reading "Barbara M. G. Lynn". The signature is written in a cursive style with a large initial 'B' and a long horizontal stroke at the end.

BARBARA M. G. LYNN
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF TEXAS